THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0473, Antonio F. Roxo v. City of Manchester Zoning Board of Adjustment, the court on June 25, 2007, issued the following order:

The defendant, the City of Manchester (City), appeals an order of the superior court ruling that the City's Zoning Board of Adjustment (ZBA) and Building Department misconstrued the frontage requirement in the City's zoning ordinance. The City argues: (1) the ZBA lacked jurisdiction to consider the plaintiff's arguments regarding frontage; (2) the trial court failed to address its arguments that the plaintiff was estopped from challenging the City's interpretation of frontage, and that the pertinent parcels had merged, thereby rendering the frontage issue moot; and (3) the trial court's interpretation of frontage was erroneous. Finding no error, we affirm.

The plaintiff owns three contiguous parcels. The parcel referred to by the parties as "lot 19" is bounded to the south by Hillcrest Avenue, an accepted public highway, which is classified as a class IV highway for its entire portion abutting lot 19. See RSA 229:5 (Supp. 2006). "Lot 32" and "lot 33" are to the west of lot 19. Lot 33 also abuts Hillcrest Avenue to the south, only twenty-eight feet of which, however, is improved and classified as a class IV highway. The remainder of Hillcrest Avenue abutting lot 33 is unimproved, and is classified as a class VI highway. Lot 32 is to the immediate north of lot 33.

The record indicates that in 2004, the plaintiff, as agent for the then-owner of the parcels, filed a minor subdivision application relative to the parcels. The plaintiff withdrew the application after the City's Planning Board issued a report stating that a consolidated lot comprised of lots 32 and 33 (lot 32/33) would require a variance because it lacked the required seventy-five feet of frontage. The plaintiff also twice applied on his own behalf for a permit to build a duplex on lot 19. The Building Department declined to issue a permit as to both applications upon the basis that lot 32/33 lacked sufficient frontage and, thus, required consolidation with lot 19.

The plaintiff did not file an appeal with the ZBA , see RSA 674:33, I(a) (Supp. 2006), but instead applied for a variance from the frontage requirement "as interpreted by the Manchester Building Department." The plaintiff argued that lot 32/33, in fact, had sufficient frontage. He asserted, however, that he was not appealing the denial of a building permit, but was merely arguing that a variance would comply with the spirit of the ordinance. See RSA 674:33, I(b) (Supp. 2006). The Building Department countered that lot 32/33 would have

only twenty-eight feet of frontage, since the class IV portion of Hillcrest Avenue was the only portion that was accessible. The ZBA denied the application.

The plaintiff appealed the ZBA's decision to the superior court, see RSA 677:4 (Supp. 2006), and sought a declaratory judgment that the interpretation of frontage by the Building Department and the ZBA was erroneous. The superior court agreed with the plaintiff that, under the plain meaning of the ordinance, frontage need not be accessible along its entire length.

We address first the City's jurisdictional argument. The City argues that because the plaintiff never appealed the determinations of the Building Department and Planning Board that lot 32/33 lacked sufficient frontage, the ZBA was without jurisdiction to consider the issue. An administrative appeal generally must comply with procedural filing deadlines. See Daniel v. B & J Realty, 134 N.H. 174, 176 (1991). A party need not, however, pursue an administrative appeal to challenge the purely legal interpretation of an ordinance by a municipal official, but may present the challenge in a petition for declaratory relief. See Morgenstern v. Town of Rye, 147 N.H. 558, 561 (2002); cf. Tremblay v. Town of Hudson, 116 N.H. 178, 179 (1976) (court will resolve the meaning of an ordinance irrespective of the administrative posture).

While the plaintiff could have appealed the legal interpretation of frontage by the Building Department to the ZBA, he was also free to raise the issue in a declaratory judgment petition, and to seek a variance upon the assumption that the Building Department was correct. Accordingly, the trial court had jurisdiction to resolve the meaning of the ordinance, which was central to the ZBA's denial of the variance application, and properly exercised its jurisdiction.

The City next argues that the trial court erred by failing to address two of its arguments: (1) that the plaintiff was estopped from challenging the interpretation of frontage by his assertion before the ZBA that he was not pursuing an administrative appeal; and (2) that the plaintiff and his predecessor treated all three lots as one, effectively merging them as a matter of law. The City raised both of these defenses in a pretrial motion to dismiss. The trial court denied the motion upon the basis that it could not conclude, as a matter of law, that the plaintiff had failed to state a claim for relief, and proceeded to conduct a bench trial on the merits. Its final order did not, however, address these issues.

It is the City's burden to demonstrate that it raised each of its appellate issues in the trial court. See In the Matter of Hampers & Hampers, 154 N.H. 275, 287 (2006). In its brief, the City does not argue that the trial court erred by denying its motion to dismiss. Rather, it argues simply that the trial court erred by not addressing the estoppel and merger defenses after the parties proffered evidence upon them at trial. The record does not, however, show that the City moved to reconsider upon the basis that the trial court neglected to address the

issues. See N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002). Accordingly, we conclude that the City has failed to preserve these arguments.

Finally, the City argues that the trial court erred by construing frontage to include the portion of Hillcrest Avenue that constitutes a class VI highway. We review the trial court's construction of an ordinance de novo, adhering to the traditional rules of statutory construction. See Duffy v. City of Dover, 149 N.H. 178, 181 (2003). We interpret an ordinance according to its plain and ordinary meaning and within the context of the overall statutory scheme, and will not add words to the ordinance that its drafters did not see fit to include. See id.; DeBenedetto v. C.L.D. Consulting Eng'rs, 153 N.H. 793, 797 (2006).

The ordinance provides that "[m]inimum lot frontage shall be a continuous, unbroken line along one (1) street," and defines "frontage" as "[t]he linear distance of any one property line of a lot, which abuts a legally accessible accepted public street, as classified by RSA 229:5." A "street" is "[a] way . . . which is dedicated or devoted to public use by legal mapping . . . or by any other lawful procedure, and includes any avenue, boulevard, parkway, road, land, public square, highway and similar public ways which affords principal access to an abutting lot." The terms "access" and "accessible" are not defined.

We agree with the plaintiff and the trial court that the plain meaning of "access" is "a landowner's legal right to pass from his land to a highway and to return without being obstructed," and that the terms "access" and "frontage" are not the same. Belluscio v. Town of Westmoreland, 139 N.H. 55, 56 (1994) (quotation omitted). Moreover, we have observed that a driveway need not be as wide as the minimum frontage requirement in order to provide access to the parcel. See Hannigan v. City of Concord, 144 N.H. 68, 76 (1999).

There is nothing in this ordinance requiring that the entirety of a parcel's frontage be along a class V or better highway, or be accessible at every possible point. Had the drafters of the ordinance so intended to limit the meaning of frontage, they could have done so expressly. See Belluscio, 139 N.H. at 56. Rather, the plain meaning of the ordinance requires only that the parcel abut an accepted public street, and that the street be capable of allowing one to pass to and from the parcel without obstruction. We disagree with the City that this construction is impermissibly vague, or invites absurd results.

The City has not challenged the trial court's finding that Hillcrest Avenue, including the class VI portion of it, is an accepted public way pursuant to RSA 229:5, and that at least seventy-five feet of it abuts each of the parcels at issue. The record shows that Hillcrest Avenue, in its entirety, was laid out in 1910. Nor was there any finding of fact that the twenty-eight feet of lot 33 abutting the class IV portion of Hillcrest Avenue was incapable of allowing one to pass to and from the parcel without obstruction. Under these circumstances, the

trial court properly concluded that the Building Department and ZBA erroneously interpreted and applied the frontage requirement of the ordinance.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk